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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 497.

MARIO MERCADO E HIJOS, *Petitioner*,

v.

ELVIRA OLIVIERI COMMINS, ET AL., *Respondents*.

ORAL ARGUMENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.*

WILLIAM CATTRON RIGBY,
PEDRO M. PORRATA,
Attorneys for Petitioner.

RIGBY, LEON and WEILL,
FRED W. LLEWELLYN,
Of Counsel.

* Reported by H. S. Middlemiss, Columbian Bldg., Washington, D. C.

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Washington, D. C.,
April 24, 1944.

The above-entitled cause was argued in The Supreme Court of the United States, commencing at 3:28 o'clock p. m. on Monday, April 24, 1944.

Before:

HONORABLE HARLAN F. STONE, the Chief Justice; and
HONORABLE OWEN J. ROBERTS;
HONORABLE HUGO L. BLACK;

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HONORABLE STANLEY F. REED;
HONORABLE FELIX FRANKFURTER;
HONORABLE WILLIAM O. DOUGLAS;
HONORABLE FRANK MURPHY;
HONORABLE ROBERT H. JACKSON; and
HONORABLE WILEY RUTLEDGE, Associate Justices, there being

Present:

On behalf of the Petitioner:

WILLIAM CATTRÓN RIGBY, FRED W. LLEWELLYN, and PEDRO M. PORRATA, ESQUIRES; and

On behalf of the Respondent:

(The case was submitted without oral argument for the Respondent.)

Thereupon the following proceedings were had and oral arguments made:

PROCEEDINGS AND ORAL ARGUMENTS

The Chief Justice: Case No. 497.

The Clerk of the Court: Counsel for the petitioner are present.

The case is submitted for the respondent.

The Chief Justice: Proceed, please.

ORAL ARGUMENT ON BEHALF OF THE PETITIONER

By Colonel William Cattron Rigby

Colonel Rigby: If the Court please, this is the other case of course, involving the rule which we have been talking about in the first case.

We are very sorry to find that we do not have any opponents here to argue this case against us.

My associate, Mr. Porrata, is here with me and will take part in the argument relating to the special matter he is interested in.

This involves Rule 39 (b) of the Circuit Court of Appeals of the First Circuit and comes here because, in this case, the Circuit Court refused to go into the case on its merits and disposed of it summarily on the filing of the statement of appeal under this rule quoted at Page 2 of our petition for certiorari, and that rule reads:

> "In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal, that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'. (Sancho Bonet v. Texas Co., 308 U. S. 463 (1940).) The court will entertain a motion by the appellee to affirm on the ground that it is manifest from the record and the statement on appeal that the judgment below was neither 'inescapably wrong' nor 'patently erroneous,' and consequently should not be disturbed by this court. Such motion, which may be united in the alternative with a motion to dismiss the appeal, may be filed within twenty days after the filing and serving of the statement on appeal. A brief in support thereof may be filed and furnished in the manner specified by Rule 25. The court may, however, upon its own motion, dismiss the appeal or affirm the judgment appealed from where the law and justice of the case so require; or, if the case is of such character as not to justify extended argument, the court may order the cause set down for immediate hearing."

Now, in this particular case, if the Court please, which is a land case in which there are rather complicated facts, there was a transcript of the record that went to the Circuit Court of Appeals and, as it is printed here, it makes 515 printed pages which would be a thousand or something in the typewritten form.

The Court will readily understand the difficulty in presenting such a record in typewritten form without being permitted to print it and, in a summary form a sufficient statement on appeal to answer the requirements of this rule and to give the Circuit Court of Appeals any real, fair, notion of whether there is the kind of case that should

be gone into on appeal by that court, if it is going to really exercise the statutory jurisdiction that is given it by the Congress in appeals from the Supreme Court of Puerto Rico.

Now, this particular case, we think it is a fair example, and I might say that there are other cases in which as we see it and as we see it in this case, there is a complete, practical, denial of justice because in order to prove to the Circuit Court of Appeals, in a preliminary way to meet their requirements, that the appellant shall show in his statement on appeal that the judgment appealed from is inescapably wrong or patently erroneous, there must be a thorough and careful analysis of the evidence, questions raised, and that sort of thing, and if you do not do it, of course, you are not showing and cannot show that it is inescapably wrong; and if you do do it you are required really to prove the whole case, prepare it just as carefully and as thoroughly, or more carefully than if you had a printed record, and you have to do it on the basis of a typewritten record,—only one copy which you hope may be passed around among all the judges.

Mr. Associate Justice Black: What is the difference in that rule and the rule that provides for pre-trial procedure?

Were the parties notified?

Colonel Rigby: The motion was made to dismiss.

Mr. Associate Justice Black: Was a notice given?

Colonel Rigby: And without any hearing there was a dismissal.

Mr. Associate Justice Black: Was there notice given?

Colonel Rigby: There was a notice given and opportunity to file a brief.

Mr. Associate Justice Black: Was any brief filed?

Colonel Rigby: No brief was filed, I believe. I was not in the case at that time, but there was a careful statement on appeal, not, however, a full statement of the case.

Mr. Associate Justice Black: What is the difference between the pre-trial procedure and the motion for summary

judgment, and this, where an effort is made to see if any substantial issue exists between the parties?

Colonel Rigby: The ordinary pre-trial procedure makes it possible for you to go before the Judge and you have an opportunity to present the question informally and to answer the questions raised, and you have an opportunity to say what you are willing to admit, and that kind of thing, and thresh the thing out in an informal way.

Here you have no opportunity for a personal hearing at all.

You are deprived of any sort of personal hearing.

The Chief Justice: Is that true under the rule, or is that just the practice?

Colonel Rigby: The rule does not seem to contemplate it being set down for argument. The practice is not to.

The practice, as we understand it, is to cut you off on any case where it depends on careful analysis.

Mr. Associate Justice Black: You were given a chance to appear in this one, and you were given a notice to file a brief and point out what real point you had in the case.

Colonel Rigby: Of course, Mr. Justice Black. But that had to be done preliminarily, within twenty days.

Mr. Associate Justice Black: How long, when a man has a summary judgment motion, how long a time does the man have there?

Colonel Rigby: In an ordinary case he probably would not have much more, but if he has a case with a record involving a thousand pages, and a complicated record of evidence, he usually would be given an opportunity for hearing.

This is not, of course, a case in a trial court.

Mr. Associate Justice Black: Is there any less reason to give a man a final and complete hearing, with a right of oral argument, in a trial court and what he would have had in an appellate court?

Colonel Rigby: Perhaps it is the other way around.

It seems, Mr. Justice, to us—

Mr. Associate Justice Black (interposing): I do not mean to say that this rule is correct.

I am trying to find out what your judgment is.

Colonel Rigby: I would say if there is any difference they are more entitled to the hearing in the appellate court.

The Chief Justice: Were the questions involved here of Puerto Rican law?

Colonel Rigby: I beg your pardon.

The Chief Justice: Were the questions that were involved here questions of the construction of Puerto Rico law?

Colonel Rigby: And depending on the analysis of the facts, as we will show you in a moment.

The case is this.

The Mercado partnership, the petitioner here—

Mr. Associate Justice Rutledge (interposing): This rule does not prohibit applications for extension of time in necessary cases, does it?

Colonel Rigby: No, so far as I know.

Mr. Associate Justice Rutledge: Was any application made for an extension?

Colonel Rigby: So far as I know, no.

Mr. Associate Justice Rutledge: And there is no limitation in the length of the typewritten pages?

Colonel Rigby: No. That is practically the case.

You try the case as you would on final trial and argument. If you properly present it you must file a brief on the final case before you have an opportunity to have your record printed, you see.

Mr. Associate Justice Rutledge: You want to print it and they want it typewritten.

Is that the difference?

Colonel Rigby: We want an opportunity, Mr. Justice, for the usual time allowed for the preparation of a case on hearing.

Mr. Associate Justice Rutledge: If the rule does not prohibit it and if you don't apply for it, then what?

Colonel Rigby: The rule talks about twenty days:

> "Such motion • • • may be filed within twenty days after the filing and serving of the statement on appeal."

Of course, it is really a practical thing, largely.

Practically, it is understood by the attorney, as requiring you either to let the thing go in a very hasty way, or else go ahead and, in a preliminary way, the first thing, brief your case and present it just as fully as though you were presenting it on final argument, and even more fully, because you won't be permitted an opportunity for an oral argument at all. You must, at your peril, in your preliminary statement on appeal, absolutely show—the word is, or the phrase is "that the Court below was inescapably wrong"; and you must do that in a way that you can stand on without any opportunity for oral argument or reply brief or anything of that sort. It is requiring more of you—

Mr. Associate Justice Rutledge: Do you think your view should apply to all cases so that counsel in any case would be permitted the kind of a hearing you want, or do you say it should apply in some cases like yours?

Colonel Rigby: Of course, that is a practical question again, but as we see it, it is wrong to have a rule that for practical purposes requires—

Mr. Associate Justice Rutledge (interposing): But the rule is not unreasonable in its application to any case?

Colonel Rigby: As we see it, it is.

Mr. Associate Justice Jackson: What difference is there between that and this court's practice in dismissing an appeal on a preliminary statement if it does not appear that there is a substantial federal question involved?

Colonel Rigby: This is a requirement that there be a showing in all cases, not simply that a real question is involved, but that the court below is inescapably wrong.

Mr. Associate Justice Jackson: That is usually easier to show than a substantial question.

If you wish to demonstrate a frivolous decision, that is easy.

Colonel Rigby: That seems to absolutely prohibit anything except the extreme case. It amounts, as we see it, to an abrogation of the jurisdiction of the Circuit Court of Appeals in all cases except the extreme case where you can show on the face inescapably wrong.

Mr. Associate Justice Frankfurter: Is there a rule—I should know it—among the rules of the First Circuit about frivolous appeals?

Colonel Rigby: Oh, yes.

Mr. Associate Justice Frankfurter: What is the rule?

Colonel Rigby: I do not have it here, but there is such a rule and no one would question it.

Mr. Associate Justice Frankfurter: This gets down to the basis of frivolous appeal, doesn't it?

Colonel Rigby: No. Quite the contrary. Instead of our being simply required to show that we have a reasonable—

Mr. Associate Justice Frankfurter (interposing): I am not saying the criteria for frivolity is the correct one, but I say this is a special rule of Puerto Rican frivolity. Am I correct?

Colonel Rigby: It is more than that.

Mr. Associate Justice Frankfurter: As to the justification; as to the basis.

The Court here has made a special rule defining when appeals from the Puerto Rican Court are frivolous.

Colonel Rigby: You may put it that way.

We object to it because it is a special rule for Puerto Rico. I think that it plainly is deprivation of the equal protection of laws to make this special drastic requirement as to appeals coming from Puerto Rico, and not the same requirement if coming from another place. It is entirely wrong.

But the answer to that question of Mr. Justice Jackson is that this rule is putting the cart before the horse: Instead of simply requiring us to show that we have reasonable

grounds that we desire to show to the Court, upon which we think we can show on the hearing, that the decision below was inescapably wrong, they require us in advance, in our statement in appeal, absolutely to show, in advance, that it was inescapably wrong, which means that we have practically to prove the whole case in advance.

Mr. Associate Justice Rutledge: Are you attacking the rule of the Circuit Court of Appeals or the decision of this Court?

Colonel Rigby: The rule of the Circuit Court of Appeals.

Mr. Associate Justice Frankfurter: Was there a construction by rule of what this Court intended to have done?

Colonel Rigby: That is what it comes to, their misunderstanding of the direction of this Court.

Mr. Associate Justice Black: Suppose the ruling were not inescapably wrong or manifestly wrong.

Colonel Rigby: It is pretty much the same thing.

Mr. Associate Justice Black: You presented the Texas case, if I recall.

Colonel Rigby: Yes.

Mr. Associate Justice Black: What is the language?

Let us suppose the rule of the First Circuit was your language one hundred per cent, and they provided just what they do here that they wanted you to let them know in advance whether or not you had a real case within the rule, and required you to issue notice and serve a brief on the other party, and so forth, would that be a good rule?

Colonel Rigby: With a little modification, if I may say.

If they simply required that we show that we have reason to believe that we have grounds that we want to present on which we think we can show that the decision below was wrong, whether you say "inescapably" or "just wrong"—

Mr. Associate Justice Black (interposing): But where does the rule fall short of that?

Colonel Rigby: The rule says not merely that you present—

Mr. Associate Justice Black (interposing): Where is it printed?

Colonel Rigby: On Page 2.

Mr. Associate Justice Black: Of your brief?

Colonel Rigby: Of our petition for certiorari, in case No. 497.

Mr. Associate Justice Black: Page 2?

Colonel Rigby: Page 2 of the petition for certiorari.

Mr. Associate Justice Black: Where does it fall short of what you think would make it a good rule?

Colonel Rigby: It starts out by saying:

> "In appeals from the Supreme Court of Puerto Rico involving only questions of local law the appellant shall be required to show in his statement on appeal that the judgment appealed from is 'inescapably wrong' or 'patently erroneous'."

Now, we think if any rule of that kind were to be adopted it ought simply to require that the appellant show in his statement on appeal grounds that he desires to present upon which he thinks that he can show that the court below was wrong.

In other words, he should not be required to show in his statement on appeal absolutely everything that he is going to present in his argument; he should be required to show simply, as in a pleading, the grounds on which he thinks he can show it when he is permitted to come before the Court and prove it, and all that; that he has grounds that he wants to present; that he has a question that he wants to present that is a reasonable question, and that he has reasonable grounds for arguing that the Court below was inescapably wrong. He should have that right, and not be foreclosed and required, absolutely in advance, to try his whole case, before he has had an opportunity to present his printed record, or to have the usual time to digest his case, and to present his brief, and to be heard in oral argument.

That is the meat of my real objection to the form and to the substance of this rule.

Mr. Associate Justice Black: I cannot see that they required that in this particular case.

Colonel Rigby: Apparently they did, as we see it.

Mr. Associate Justice Black: You did not appear at all?

Colonel Rigby: I, personally, did not.

We appeared, filed the statement on appeal, complied with the rule so far as we could; and they held that it was not sufficient.

Now, we believe that this is a very strong case for showing that it was unjust to permit the thing to go off, requiring the thing to go off without hearing.

Mr. Associate Justice Jackson: Can you quite say "it went off without hearing"?

In your statement of points you file eight points on which an appeal is desired. They seem to me to indicate what is involved because, as far as I understand you say, under point 7:

> "The Supreme Court of Puerto Rico committed plain error of law in not adopting the interpretation placed by the parties themselves through their own conduct upon the covenant of March 23, 1932, to the effect that the personal privileges granted to Mario Mercado E Hijos in the said covenant did not follow the mortgage notes in the hands of the holder in due course."

You want to reargue the evidence on that?

Colonel Rigby: Yes.

Mr. Associate Justice Jackson: That is perfectly plain. I do not see why that should not be amplified in order for the Court to say "review of evidence."

Then, in addition to your statement of points, there is a statement on appeal, a number of pages, that amplifies the propositions that are desired to be presented.

I do not understand that this was not sufficient or that you are precluded from presenting more.

Colonel Rigby: The trouble is we are not given any opportunity to know whether or not that will be sufficient.

If we make the complete proof as long as you would in arguing this on final hearing, that is one thing.

If you come from any other court but the Supreme Court of Puerto Rico you have an opportunity to come in in the usual way, to present your brief and, when your opponent replies to your brief, to file a reply brief and to be heard on argument.

Mr. Associate Justice Jackson: Yes. But there are very valid reasons for a court not bringing lawyers and parties from Puerto Rico at times like this particularly unless there is a pretty substantial question that, on the face of it, does present a case.

Colonel Rigby: I am afraid I cannot take more time on that. My time is running.

We think this was a case where there was a real abuse, because we were not permitted an opportunity to really analyze the case.

Mr. Associate Justice Douglas: Are you suggesting that we could do something about this rule?

Colonel Rigby: Yes, if the Court please.

Mr. Associate Justice Douglas: We can do something about the case.

What about the rule?

Colonel Rigby: No. About the particular case. And we believe, of course, the Circuit Court of Appeals will be very glad to follow the indication of this Court if it has misunderstood the rule of this Court, as we think it has done, as to the deference to be shown to the decisions of the lower court.

We do think, as we said in the other case, that the decision of this court means, simply, that if there is reasonable logic behind the decision of the Insular Court, or if there are one, two, or three different solutions of the problem in the particular case and the Insular Court has adopted one, that although there may be one equally or even more reasonable, its decision ought not to be disturbed for that reason; but that if it is a case where it is clearly wrong, where you have simply either a right or a wrong, that in

such a case neither the Circuit Court of Appeals nor this Court is to abdicate its own judgment and not exercise its own judgment upon the decision in that case.

Mr. Associate Justice Black: What is the difference in "clearly wrong" and "inescapably wrong"?

Colonel Rigby: I don't think there is much difference.

Take the other case: You have to say either one thing or the other. Does "tenure of office during good conduct" mean "for life" or does it mean something else?

In this case there are several of these direct questions.

You cannot say that the decision of the Insular Court was logical or reasonable or right and may be sustained on that ground.

In this particular case the story is that the Mercado firm had an option in 1932, as part of their mortgage, a $40,000 mortgage; they were also lessees of the property under ten year leases;—option to buy or to lease if Mrs. Commins wanted to sell or lease; they had an option to do that upon the same terms that anyone else offered, and they were entitled to have thirty days notice of any offer that was made and to have an opportunity to exercise the option if they wanted to.

Mr. Associate Justice Frankfurter: As I understand it, the Circuit Court of Appeals did not listen to the merits of this controversy.

Colonel Rigby: That is right.

Mr. Associate Justice Frankfurter: Are you suggesting that we should now consider the merits of the controversy rather than consider whether or not the Circuit Court of Appeals of the First Circuit has deemed itself under an obligation to not consider questions that come up from Puerto Rico because they have interpreted certain words of ours to have almost a sacred or mathematical significance?

Colonel Rigby: That is it, and that is why we do want to have you consider the merits.

Mr. Associate Justice Douglas: They must have considered the merits because they affirmed the judgment.

Colonel Rigby: They simply affirmed under their Rule 39 (b).

Mr. Associate Justice Frankfurter: I understand that, but if their notion is that if something is mathematically or inescapably wrong then they must consider—you don't expect us to look independently, in this case, into the question of whether, in this case, the Circuit Court of Appeals have examined the merits, in any real sense of the term, and, if they have not examined the merits, whether we should examine the merits, rather than merely consider what the situation is on the part of the Circuit Court of Appeals with reference to Puerto Rico decisions.

You say that the Circuit Court of Appeals did not consider the merits.

Colonel Rigby: They did not.

Mr. Associate Justice Roberts: Your point is that someone should examine the merits.

Colonel Rigby: Yes. We asked for certiorari to be granted or mandamus to be granted to the Circuit Court of Appeals.

Mr. Associate Justice Frankfurter: They felt themselves under the pressure, which is not ostensible pressure, over them, in view of the jurisdictional act?

Colonel Rigby: That is why we asked for mandamus in the alternative; but, this court granted certiorari.

Mr. Associate Justice Frankfurter: It would not be the first time that this court would not examine so-called local questions which the lower court did not and would not; we simply sent the cases back.

Colonel Rigby: We think a very proper thing to do would be to send it back to that court and relieve us from the argument of the merits here in this Court.

Mr. Associate Justice Jackson: Which of the eight assignments of error, under your rule, do you say the Circuit Court of Appeals would be obliged to pass upon under your rule?

Colonel Rigby: I do not know that I am quite in a position, off the bat, to answer that question; they all run to the case, but certainly—

Mr. Associate Justice Jackson (interposing): Take the questions of local law.

Colonel Rigby: There are questions of local law.

Mr. Associate Justice Jackson: Your No. 1 is that the Supreme Court made an error.

Colonel Rigby: Yes.

Mr. Associate Justice Jackson: Then that they did not follow the law, on Page 496, of some case in California and a case in Oregon, and cases in Kansas and Minnesota, and so forth.

Colonel Rigby: That is a question of local law, and that we understand should be examined by the Circuit Court of Appeals under the jurisdiction given and imposed on it by Congress, by Judicial Code.

Mr. Associate Justice Jackson: You say that the local law should be examined?

Colonel Rigby: Surely.

Mr. Associate Justice Jackson: What about the weight of the evidence?

Colonel Rigby: The same provision as to the local law.

If the case is a case where the decision of the lower court was so clearly wrong, as we think it is.

In other words, the jurisdiction of the Circuit Court of Appeals is an absolute jurisdiction on appeal in the same way that the jurisdiction of a state Supreme Court, from a local court, is.

Now, it may be when they come to the end of the thing and, having examined it to determine whether or not they should reverse, it is very proper and right for them to consider the deference to be shown the local court on the question of local law in the same way as it is right for the Supreme Court of Virginia, for example, to pay deference to the decisions of the local court sitting in Roanoke on a local question, but that has nothing to do with the question of their duty, as we see it, to hear the case.

Now, they not having heard it, we are here, and we ask this court to hear it under the certiorari that has been granted, or to send it back to the Circuit Court of Appeals to hear it; and, being here apparently on the merits, we are prepared to argue the merits here and to show to this court that, as we see it, the decision of the Insular Supreme Court was wholly wrong; wholly wrong because here was a case where the option being given, as I said, and a trick being put up to avoid the option on the theory that because on the record of the assignment of the bearer promissory notes secured by the mortgage deed, of which the option was one clause, the record of the assignment of the transfer of the mortgage credits did not specifically reserve on the face of the record the option to the hands of the partnership,—the fact that it had not done so was taken advantage of by the vendor, by the optionor to give to her own members of her own family an opportunity to buy the property and to get away from the option.

What they did was this:

Knowing—and the District Court finds that they did know all about it: the Supreme Court of Puerto Rico finds that they did know all about it,—Mrs. Elvira Olivieri Commins had a talk with the mother of the Passarell family who wanted to buy this land, right between the lands of the two families, as a present to her son and daughters, and agreed—the evidence is practically undisputed—on the purchase of part, and lease of part of it.

Then, instead of notifying the Mercado partnership, as she was bound to do by the terms of the option, giving them thirty days to buy, they proceeded to go through a whole lot of machinery for the purpose of hiding the fact that they were selling to this family.

Mrs. de Delgado, the mother, put the money she wanted to use as a gift to her children into the hands of her son and he proceeded to make a nominal six months mortgage or lend on the nominal six months mortgage to Mrs. Commins and then she let him continue to hold it, and he then

took the money and proceeded to pay it over to the purchasers of the bearer notes and, behind the back of the partnership, without notifying them at all, in that way nominally cancelled the mortgage.

Having done that they thought: Now, we are entitled to buy the property free of the option; and they proceeded to put the purchase of record in that way; and then, of course, as soon as it came out—meantime she, Mrs. Commins, had been going ahead apparently negotiating with the Mercado partnership, if you please, to sell the property to them.

On the very day they were closing there was a conversation in the office of the attorney for all of them, Jose Sabater, when the manager of the partnership asked the son-in-law how the thing was going along and he said, "All right."

That same day they closed the cancellation of the other mortgage behind the backs of the partnership and then proceeded to put the thing of record; and a demand was made immediately by the partnership for opportunity to exercise the option and was denied; and this lawsuit resulted.

Now, it seems to us just as plain a case of a deliberate trick as could be, and the partnership was denied recovery by the Insular Court purely on the ground that they held that although there was complete knowledge of the option Section 152 of the Mortgage Law and Section 1418 of the Civil Code, which are simply and purely registry laws, not having been complied with,—it not appearing on the record, that there was the reservation to the partnership of the option in selling the mortgage notes, that they could not have the benefit of the option.

Now, that is against decision after decision of the Supreme Court of Puerto Rico, its holdings that the absence of record cannot be taken advantage of by one who knows all the facts, and, of course, contrary to the law of England as it has been since 1693, and of all the laws of the states, that no person can claim to be an innocent third party and take

advantage of that situation who knows and who does really and truly have knowledge of the whole thing.

My associate, Mr. Porrata——

Mr. Associate Justice Black (interposing): One question: Of what right do you say the rule, just the rule itself, has deprived you?

Colonel Rigby: Of the opportunity, if the Court please—

Mr. Associate Justice Black (interposing): To do what?

Colonel Rigby: Present these facts.

Mr. Associate Justice Black: You mean to file a brief? Has it denied you that right? Has it denied you the right to file a brief?

Colonel Rigby: It has denied us the right to file a brief in the usual way.

Mr. Associate Justice Black: I am not talking about that, about "in the usual way."

Did it deny you the right to file a brief and set out grounds?

Were you given notice for that purpose? And does the rule say you could file it?

Colonel Rigby: The rule provides that you may answer a motion to dismiss.

Mr. Associate Justice Black: Yes. Is there any reason why you could not file your brief before?

What I am getting at is simply this: Has it denied any other right than that of oral argument, if it has denied the right of oral argument?

Understand I am not talking about whether the rule was right or wrong, I am merely asking if it has denied you any right.

Colonel Rigby: It has denied us the right to present the case in the same way you present a case coming from any other court.

Mr. Associate Justice Black: Just to put it concretely: You had a right to file a brief. What privilege were you denied?

Colonel Rigby: If you came from another court you would have the time provided by the rules of the court for the preparation of your case.

Mr. Associate Justice Black: Was any objection made that the time was too short?

Colonel Rigby: In this particular case?

Mr. Associate Justice Black: Yes.

Colonel Rigby: No, I do not think that there was, so far as I know.

Mr. Associate Justice Black: Have you set up or has there been set up any statement here that they did not have long enough time in which to file a brief?

Colonel Rigby: There has been no specific statement of that kind; no.

The Chief Justice: How does this rule differ from a rule that an appeal may be dismissed as frivolous?

Colonel Rigby: It is the other side of the picture, Mr. Chief Justice.

Instead of requiring us to show a reasonable question for consideration only, it requires us, preliminarily, to show that we are entitled to win absolutely.

The Chief Justice: Not quite that.

When you measure the term "frivolous" you measure it in terms of existing law.

Colonel Rigby: Yes.

The Chief Justice: If the rule announced by this court is the right rule that the finding of the lower court must be affirmed unless it is shown to be inescapably wrong, that does not bar it as frivolous?

Colonel Rigby: That means after a hearing, after an opportunity has been had to present your case.

The Chief Justice: Do you have the right of argument on a motion to dismiss an appeal as frivolous?

Colonel Rigby: No. But as I understand it, the motion will be denied if you show there is a reasonable question to be considered.

The Chief Justice: Yes.

Colonel Rigby: But under this Rule 39(b) you have to show in advance not only a reasonable question, but you have to show that you are absolutely right and will win; and you must be able to show that the thing is inescapably wrong.

Mr. Associate Justice Black: Does it not require you to show that it comes within that degree of proof that you show the court can reasonably believe that you have a case?

Colonel Rigby: It does not say that.

Mr. Associate Justice Black: Does it not mean that?

Colonel Rigby: Practically much more. We have not merely got to show that we have a reasonable question to present, but that we are going absolutely to win.

Mr. Associate Justice Black: You mean that you must show that you have a reasonable ground to believe that it can be established that this thing is patently wrong or inescapably wrong?

Colonel Rigby: If the rule read that way we would not complain of it.

Mr. Associate Justice Black: What is your complaint? Do you think the rule means more than that?

Colonel Rigby: Yes.

Mr. Associate Justice Frankfurter: Suppose the Circuit Court of Appeals had said: As we read those who give us the law we must believe, for all practical purposes, that the decisions of the Supreme Court of Puerto Rico are all right. Suppose they said that?

Have they not said that that is what they think their duty is?

Colonel Rigby: That seems to be about what we think the rule means.

Mr. Associate Justice Frankfurter: An attitude of mind?

Colonel Rigby: Yes. But it may be an explanation of their attitude of mind.

As we see it it means that they think they are foreclosed.

Mr. Associate Justice Frankfurter: They have said that in so many words.

Colonel Rigby: Yes.

Mr. Associate Justice Frankfurter: Foreclosed not because on an examination of this particular case they find that the weight should go against the objection but that all the weight should go over and before what had been decided below because, as to Puerto Rico, they are supposed to be a rubber stamp.

That is your notion?

Colonel Rigby: That is our notion and we object.

Now, my associate, Mr. Porrata would like to present his views.

Oral Argument by Mr Porrata.

Mr. Porrata: From the decisions of the Court, of the Circuit Court of Appeals, it is clear that the whole thing arises from the Court being sore on account of reverses. It says so. That is the decision of the Court itself. It shows that the Court has not got the best consideration of the people of Puerto Rico. It was because there were some reverses and the Court thought that these reverses amounted to a declaration that there was no use to take appeals there. That is the situation and that is why that rule is being interpreted by the Court down there as a mathematical formula instead of as a legal formula, and when we get in there it highly prejudices our cases.

When Congress gave us the power, and we have not the right to go behind the will of the Congress, but when Congress gives us the right to go to the Circuit Court it says clearly that in all cases involving over $5,000 we have a right to go to the Circuit Court of Appeals; and, who can take that right away except Congress? That is my question. Or who can prejudice that right in any way?

The way I understood the rule as laid down by the Supreme Court is this way: You take the case, the Texas case, and look in the facts of the case and the law applicable and

the law interpretable and, after making an examination of that case, the Court reaches the conclusion that it is all right to allow that judgment to stand even though the Court may have a different opinion, maybe a little more reasonable, but, on its entire examination of the case, comparison, and distinguishing of all facts and those involved—for example in our case we sustain that the Supreme Court of Puerto Rico reached a conclusion of fact that under the constant jurisprudence of the Supreme Court of Spain, of the Supreme Court of Puerto Rico, of all the states of the Nation, of the English Court of Chancery, that judgment is wrong and should not be allowed to stand as a decision of the courts created by Congress for us.

Here is a man with notice that a man had an option.

The Supreme Court finds he had notice and deliberately violated an option and yet, after making that finding, holds in favor of that *mala fide* purchaser.

We cite all the cases from the Supreme Court of Puerto Rico, found as a matter of fact by the Supreme Court of Puerto Rico, and say that we have a right to a decision in our favor.

Now, we show that under the doctrine of the Supreme Court of Spain, interpreting the same provisions of the code, that no *mala fide* purchaser will be allowed to escape with his fruit. We show by the Chancery Court of England that no *mala fide* purchaser has been allowed to escape with the fruits of his *mala fide* conduct. Shall we say that the Supreme Court of Puerto Rico may have some reasoning for its decision, for its judgment?

Now, if that decision of that Court is contrary to the decisions of the Federal Courts in the States, to the decisions of the Courts in the Nation, to the decisions of the Supreme Court of Puerto Rico, and to the decisions of the Courts of Spain, we have a right to have that case overruled as being clearly erroneous.

Now the similar principle is this: This doctrine to respect the local courts is not something mysterious. In the case of findings of lower courts the courts of appeal won't

review those findings unless there is some justification. Now, when is it that there is a justification to review these findings? Well, in many cases the logical processes to reach these findings is found to be wanting in fact when there is overweight of the evidence and they are reviewed. There are more than twenty instances in which our Court of Appeals reviews the findings of our lower court. It does not say that they are going to review those findings blindly, and close our eyes. No. We have to go through with our thinking processes to reach a conclusion. Sometimes it may require other thinking. And every time a mathematical formula comes in that makes that phrase "inescapable" and "inescapably wrong" so dangerous, because unless it is applied with judicial significance and unless it is applied after an examination and a comparison of the questions involved it may lead you into error in the resolution of the case. For example, in this case the Supreme Court mentions a statute, the Code, the Mortgage Law, and yet we say that none of the statutes are involved in this case.

What is involved in this case according to my judgment and according to the judgment of the Petitioner? A statute—but a statute written where? A statute which is called in the States, in Spain, in Puerto Rico, the same where every good law is, that any *mala fide* purchaser will be not allowed to escape with his fruits of misconduct. And I will repeat to you a finding of the Court below to show you where it is that the insular Court has absolutely contrary to the statute which is universal—because in the application of this Rule, your Honors, we must distinguish between certain principles of law which are the same everywhere in the world, and certain principles of purely local law in the Island of Puerto Rico, and that is, you have as much reason to know the principles of logic as we do in Puerto Rico and when the question involved is not any matter particularly of local law but a matter of principle, are we going to say that we here will interpret that principle in a different way than everywhere in the world? I don't think so. The Supreme Court of Puerto Rico may

make a mistake. Here is the finding of the Supreme Court in this case:

In our case we filed an action to exercise an option and while that action was pending they filed an ejectment action against the partnership and that was tried in the District Court at Ponce and it was decided in our favor; that is in favor of the partnership. An appeal was taken to the Supreme Court and that was the Supreme Court of Puerto Rico, and that ejectment case was sustained in our favor and the Court made a finding in that case involving these same facts, and it says:

> "We do not wish to reach any conclusions in this case which might affect the decision of the questions on their merits, but we do state that the evidence of the witnesses has shown (and this refers to the facts proven) that the plaintiffs had knowledge of the option alleged by the defendant before the signing of deed number 14 of March 9th, 1937, * * * that they knew that the defendant was trying to enforce said right before the cancellation of the mortgage, and that the defendant was never given a chance to make use of its option."

Mr. Associate Justice Black: What page of the record is this ejectment suit referred to and is this quotation to be found?

Mr. Porrata: That quotation is from the judgment in the ejectment suit.

That is cited in our brief and the Supreme Court of Puerto Rico refers to it.

Mr. Associate Justice Roberts: What was this case?

This was a case to enforce an option, was it?

Mr. Porrata: Yes.

Mr. Associate Justice Roberts: Did they sustain you in the ejectment suit?

Mr. Porrata: Yes, sir.

Mr. Associate Justice Roberts: And left you in possession?

Mr. Porrata: Yes.

Mr. Associate Justice Roberts: Then when the other party turned about and started to enforce his option—or you wanted to enforce the option——

Mr. Porrata (interposing): Yes.

Mr. Associate Justice Roberts (continuing) ——they held that there was a defense against that?

Mr. Porrata: Yes; that knowledge——

Mr. Associate Justice Roberts (interposing): Because the mortgage notes did not have any reference to the option?

Mr. Porrata: Exactly.

Mr. Associate Justice Roberts: And they said the man who dealt with the notes knew?

Mr. Porrata: Yes. If you take that case according to jurisprudence, then good faith is unwritten law. If you take it to any court in the 'States, what will they say to you? If you take it to the Supreme Court in Puerto Rico, what? Look at the *Quintana* case (*Quintana* v. *Capital of Puerto Rico*, 51 P. R. R. 103). They were told there that the seller of the property was not the owner of the property, so he knew he was buying from somebody else—under that principle of law the Court told them they could not do what the Court let them do here.

You must excuse me, your Honors—we Latins do get sometimes very excited!

The Chief Justice: That is quite all right.

Mr. Porrata: That is why we say in our statement of points not that we want the Court to review the evidence because the finding of fact on the evidence was in our favor.

Mr. Associate Justice Frankfurter: How did the Supreme Court of Puerto Rico deal with this question of good faith?

Mr. Porrata: Unanimously held good faith is proper.

Mr. Associate Justice Frankfurter: Yes, but——

Mr. Associate Justice Roberts (interposing): They said the purchaser had a right to stand on the record no matter what he knew. That is what they held, is it?

Mr. Porrata: Yes, and we say the record informed him anyway.

Mr. Associate Justice Roberts: You say he had actual knowledge?

Mr. Porrata: We say he had actual knowledge and he had constructive knowledge, too, and he acquired all that information before.

Mr. Associate Justice Frankfurter: What did they do with the actual knowledge point?

Mr. Porrata: They find he had actual knowledge.

Mr. Associate Justice Frankfurter: They found that?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: And what legal conclusion did they draw from it?

Mr. Associate Justice Roberts: That it was not material.

Mr. Associate Justice Frankfurter: What did they say? Did they say anything about it?

Mr. Porrata: No.

Mr. Associate Justice Frankfurter: They found knowledge?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: Actual knowledge?

Mr. Porrata: Yes.

Mr. Associate Justice Frankfurter: Did they say anything about it?

Mr. Porrata: They did not touch it.

Mr. Associate Justice Frankfurter: They found knowledge of the fact but did not take account of it?

Mr. Porrata: Yes.

Now, in the ejectment case on the contrary they decided in our favor. That is why we say they committed error.

The brief of the respondent itself shows that you have to give us that concession and it shows that we have the right to go to the Circuit Court.

We lawyers are highly responsible for the decisions of the Court. We may cause the Court to render a decision in Ponce different from some law, as in this case.

Why they make a contract with us and why they deprive us of the right of that contract and why the Courts should

say we are right in the one case and wrong in the other case, which is the same, is beyond us. This looks like the method they use in Europe: make a treaty and if you don't like the treaty we shoot you.

Excuse me, again, please, my excitement.

That agreement between these people was a private law between the two people and anyone who knew about it should respect it. Everyone must know it. A private law must be respected if you know it.

That is why we want this case to be examined, your Honors.

Mr. Associate Justice Frankfurter: Is it your suggestion that this was a surprise decision like some made in this Court and the Supreme Court of Puerto Rico changed its law?

Mr. Porrata: Absolutely.

Mr. Associate Justice Frankfurter: So, when the decision came down they decided by a rule of law that you did not argue?

Mr. Porrata: You are right. Of course I cannot explain that.

Our reply brief contains all the decisions of the Courts and cites cases in England, Kentucky, Massachusetts—everywhere and the general principle that the courts won't let a man get away with the fruits of his fraud or bad faith.

Mr. Associate Justice Frankfurter: Did you apply for a re-hearing to the Supreme Court of Puerto Rico?

Mr. Porrata: We applied for a re-hearing but they were in vacation.

Mr. Associate Justice Frankfurter: Did you before the Circuit Court of Appeals raise the point that this was a surprise decision?

Mr. Porrata: Yes.

Mr. Associate Justice Black: What is the new point you say you were surprised with, or that they surprised you with?

Mr. Porrata: What?

Mr. Associate Justice Black: What is the new point they surprised you with?

Mr. Porrata: After finding that everyone knew of the option the surprise was this: they decided the case in our favor, and then —

Mr. Associate Justice Black (interposing) They decided something about bad faith?

Mr. Porrata: I say I was surprised when they let the man escape with the fruits of his bad faith.

Mr. Associate Justice Black: As I read the record, at page 486, they held there was no bad faith.

Mr. Porrata: What is that?

Mr. Associate Justice Black: At page 486 of the transcript of record, the Opinion of the Court, we find this:

> "The court comes to the conclusion that neither conspiracy nor fraud on the part of the defendants against the plaintiffs in these cases has been shown."

Mr. Porrata: There is one error: fraud is implied from knowledge.

Mr. Associate Justice Black: They then say:

> "Having reached the foregoing conclusions, the court deems it unnecessary to consider the other questions of law raised and discussed in the present cases by counsel for both sides",

and they approve the finding.

Mr. Porrata: There is the inescapable error of the Court of Puerto Rico in these cases.

Mr. Associate Justice Frankfurter: You contend that they are not purchasers in good faith.

Mr. Porrata: They did not purchase in good faith.

The whole matter of knowledge carries the implication of law.

Mr. Associate Justice Roberts: As I understand it, wherever there is a record system you are bound by the record.

Mr. Porrata: Yes.

Mr. Associate Justice: But you are also equitably bound by notice of the fact if it is not on record.

The Supreme Court of Puerto Rico said, in substance, "Never mind if he knew it. We are going to hold, from now on, in Puerto Rico, that a man who has knowledge of that and acts as though he had not the knowledge is acting lawfully."

Mr. Associate Justice Black: What you say is is that the Supreme Court of Puerto Rico held that.

Mr. Porrata: Yes.

Mr. Associate Justice Black: And you want us to say that they did not have a right to hold that?

Mr. Porrata: Yes. The holding is contrary—

Mr. Associate Justice Black (interposing) To what the Court held before?

Mr. Porrata: And to all the laws of equitable jurisdictions.

Mr. Associate Justice Black: And is it contrary to the statutes?

Mr. Porrata: Yes, it is, the statute of good faith; that is unwritten.

Mr. Associate Justice Black: What statute?

Mr. Porrata: That no one can escape free who is guilty of bad faith.

Mr. Associate Justice Black: Where is that in the brief?

Mr. Porrata: That we are not going to hold a decision is correct where someone is guilty of bad faith.

The Supreme Court of Puerto Rico made a mistake; that is all.

I am sure the Supreme Court is not satisfied with that decision.

(Thereupon the oral argument in the instant case was concluded.)